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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 283

WESLEY GREENE,

Petitioner,

vs.

THE ART INSTITUTE OF CHICAGO, AN ILLINOIS CORPORATION NOT FOR PROFIT, AND THE NORTHERN TRUST COMPANY, A CORPORATION, TRUSTEE AND EXECUTOR OF THE ESTATE OF BENJAMIN F. FERGUSON, DECEASED,

Respondents.

BRIEF OF RESPONDENT, THE ART INSTITUTE OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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A.

There Are at Least Two Inescapable Reasons Why the Petition for Writ of Certiorari Should Not Be Allowed.

1. Petitioner Waived Constitutional Questions in the Illinois Courts.

Petitioner elected to take an appeal from the *nisi prius* Court to the Appellate Court of Illinois, and not to appeal directly to the Supreme Court, as provided by Illinois statutes and cases. The Civil Practice Act of Illinois provides, "Appeals shall be taken directly to the

Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the Constitution is involved." Ill. Rev. Statutes, Chap. 110, Sec. 75. Although a Constitutional question may have been raised by the pleadings in such case, or on trial, when the appellant takes his case to the Appellate Court and assigns errors of which that court has jurisdiction, he thereby waives any Constitutional questions.

The foregoing rule applies even though the Constitutional question be one involving the Constitution of the United States. *Parker* v. *The People of the State of Illinois*, 333 U. S. 571; s. c. 396 Ill. 583; *Central Union Telephone Company* v. *City of Edwardsville*, 269 U. S. 190. We quote from Judge Taft's opinion in the last cited case, at page 194:

> "But counsel for plaintiff in error insist that it is for this Court to determine finally whether a litigant in a state court has waived his federal right, citing *Davis* v. *O'Hara*, 266 U. S. 314; *Davis* v. *Wechsler*, 263 U. S. 22; *American Railway Co.* v. *Lewee*, 263 U. S. 19; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Union Pacific Railway Company* v. *Public Service Commission*, 248 U. S. 67. But there is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court. We said in *John* v. *Paullin*, 231 U. S. 583, 585: 'Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when

Federal rights are in controversy than when the case turns entirely upon questions of local or general law,' —and many cases are there cited.

"It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the other questions in the case, and then, if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided; but he gives up the right to raise constitutional objections in any court. There is some complaint that counsel could not infer that the constitutional questions referred to in the statute were federal questions, because the Supreme Court of Illinois had not so decided before this case. We have not been able to determine from the Illinois decisions cited above whether any of the constitutional questions held to be waived therein were federal until the present case. It is not, however, a forced or strained interpretation to hold that 'cases * * * in which the validity of a statute or construction of the Constitution is involved' include validity under, or construction of, both constitutions. When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case."

The Supreme Court of Illinois stated the rule cogently in *People* v. *Rosenthal*, 370 Ill. 244, at p. 247, where the Court said:

"The first two contentions present constructions of the constitution. The Civil Practice Act (Ill. Rev. Stat. 1937, chap. 110, par. 199) requires that all cases in which constitutional questions are raised must be taken directly to this court for review. If such a case is taken to the Appellate Court and other errors are assigned of which that court has jurisdiction, the

> plaintiff in error or appellant is held to have waived the constitutional questions. (*People* v. *Terrill*, 362 Ill. 61, and cases there cited.) The constitutional questions urged by plaintiffs in error cannot be considered."

In the case first above cited, *Parker* v. *Illinois*, 333 U. S. 571, Parker was sentenced to jail for contempt of court. He did not seek to take the case directly to the Illinois Supreme Court, but instead took it to the Appellate Court of Illinois, where he sought to reverse on the grounds, among others, that it violated the First and Fourteenth Amendments to the Federal Constitution. The Illinois Appellate Court did not consider these Constitutional grounds. It sustained the order on non-constitutional grounds. On writ of error to the Illinois Supreme Court, the judgment of the Appellate Court was affirmed. The U. S. Supreme Court likewise did not consider the Constitutional questions which Parker again presented. The court said (333 U. S. p. 573):

> "For it is well-settled law in Illinois that if an appellant takes his case to the Appellate Court where errors are assigned of which that court has jurisdiction, he is deemed to have waived any constitutional questions. *People* v. *Rosenthal*, 370 Ill. 244, 247, 18 N. E. 2d 450, 452; *People* v. *McDonnell*, 377 Ill. 568, 569, 37 N. E. 2d 159, 160. That was the reason neither of the courts below passed on the federal constitutional questions tendered by petitioner. * * *".

Neither the Appellate Court nor the Supreme Court of Illinois could have passed on any Federal Constitutional question sought to have been raised by the petitioner in the case at bar because of the manner in which petitioner filed his appellate proceedings below.

2. The Record Does Not Show Affirmatively That a Federal Constitutional Question Was Decided by the Supreme Court of Illinois.

A second reason why this petition for writ of certiorari should not be granted is that it does not appear from the petition or from the record that the Federal question was presented for decision to the highest court of the State of Illinois having jurisdiction, or that its decision was necessary to the determination of the case, or that it was decided wrongly by that court. *Honeyman* v. *Hanan*, 300 U. S. 14, 18. It is a prerequisite to the jurisdiction of the Supreme Court to review a judgment of a state court that a Federal question was properly before the state court and that the state court based its decision on that claim. If a state court judgment is rested on a non-Federal question, *i. e.* on relevant state law, the Supreme Court is constitutionally barred from reviewing it. See dissenting opinion of Mr. Justice Frankfurter in *Konigsberg* v. *State Bar*, 353 U. S. 252, at page 275. It must appear that the Constitutional question presented was substantial, that it was necessary to the state decision, and that it was decided wrongly.

In the case at bar, the case was heard in the Superior Court of Cook County, Illinois. The result was adverse to the plaintiff (petitioner), who thereupon prosecuted an appeal to the Appellate Court of Illinois for the First District. The case there was heard on non-Federal grounds and the Appellate Court rendered a written opinion, which is found in Appendix A, page 1a, of the petition for writ of certiorari in this case. The Appellate Court did not consider any Constitutional grounds, which it could not do under the laws of the State of Illinois, but decided the case on four non-Federal grounds, pp. 4a and 5a. (See also petition for certiorari, p. 7.) Plaintiff (petitioner) then filed a petition for leave to appeal to the Supreme Court

of Illinois. In Illinois practice the petition for leave to appeal has replaced the common law petition for writ of certiorari, but it is substantially the same thing. Ill. Rev. Stat., chap. 110, § 75. The judgment of the Supreme Court was that the petition for leave to appeal be denied. The Supreme Court did not write an opinion.

The law of the State of Illinois is clear, that the denial of a petition for leave to appeal makes the judgment of the Appellate Court final. This Court held in *Minneapolis, St. Paul and Sault Ste. Marie Railway Company* v. *Rock*, 279 U. S. 410, to this effect, that the denial of a petition for certiorari (leave to appeal) makes the judgment of the Appellate Court final. While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it and is, therefore, in effect an affirmance of the judgment, citing *Soden* v. *Clancy*, 269 Ill. 98, 102; *People* v. *Grant*, 283 Ill. 391, 397. Such judgment is reviewable by the Supreme Court of the United States in a properly brought case. In the case first cited, the Court at p. 412 quotes from *Williams* v. *Bruffy*, 102 U. S. 248 at 255, as follows:

> "Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which by law it can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach." See also *Gregory* v. *McVeigh*, 23 Wall. 294, 304.

The statement of this rule has been made in *Graham* v. *White-Phillips Company*, 296 U. S. 27, which holds that denial of certiorari does not import approval of the reasons assigned by the lower court. The rule is also stated in *Cohen* v. *New York Life*, 132 F. 2d 496, where it is said:

> "It must be remembered always that denial of

certiorari by the Supreme Court imports nothing more than an approval of the conclusion reached by the lower court and is not to be construed as an approval of the reasons assigned by that lower court in reaching its conclusion." (p. 496)

We are, therefore, left to speculation as to why the Illinois Supreme Court denied the petition for leave to appeal. It did not deny it on Constitutional grounds because the alleged Constitutional ground was not properly presented to that court. It may have denied it on the non-Federal ground that petitioner adopted the wrong procedure to raise a Federal Constitutional question. That would seem logical in view of the decision in *Parker* v. *Illinois*, 333 U. S. 571. On the other hand, while the denial of the petition for leave to appeal did not act as an approval of the reasons given by the Appellate Court for its opinion, this court is not prevented from looking at those reasons to determine what might have been before the Illinois Supreme Court for consideration at the time of taking action. In *Lynch* v. *New York*, 293 U. S. 52, 54, the Supreme Court of the United States did look at the decision of the intermediate Appellate Court of New York for a clue as to what may have motivated the Court of Appeals of that state. In *Ellis v. Board of Education of Yonkers*, 349 U. S. 458, the Court of Appeals of New York wrote no opinion, but the Supreme Court of the United States examined the opinion of the intermediate Appellate Court. See Note 7, p. 463. There are four cogent non-Federal reasons given in the opinion of the Appellate Court in this case and on any one of them the petition for leave to appeal might have been denied. All of them are non-Federal. In addition, there is a compelling reason, that is, that the petitioner waived his Constitutional question by the procedure which he voluntarily elected.

B.

A Brief History of This Case.

The petitioner, Wesley Greene, as an individual taxpayer and citizen of Chicago, brought this suit April 10, 1957 in the Superior Court of Cook County against The Art Institute of Chicago and The Northern Trust Company, Trustee and Executor of the Estate of Benjamin F. Ferguson, Deceased. Petitioner set out four objectives of his suit:

(1) To vacate a decree of the Circuit Court of Cook County entered May 22, 1933, in a suit entitled "*Art Institute* v. *Otto Kerner, Attorney General*," No. B 269011; (this decree held that the word "monument" used in the creation of the B. F. Ferguson Monument Fund meant and included a monumental building, and that the income from said fund might be used by the trustees for that purpose).

(2) To vacate a decree of the Circuit Court of Cook County entered June 13, 1956, in a suit entitled "*The Art Institute of Chicago* v. *Latham Castle, Attorney General*," No. 55 C 249; (this decree was entered after the failure to build the monumental building authorized in 1933; the court again held that the word "monument" included memorial buildings and other forms of monument, and that a different building proposed to be built by the Trustees would be a memorial building and a "monument" within the meaning of the Ferguson Will).

(3) To secure an order on the defendant Art Institute to "comply with the Will of Benjamin F. Ferguson in administering the B. F. Ferguson Monument Fund, which is a charitable trust created thereunder, and for an accounting."

(4) To remove defendant The Northern Trust Company as Trustee under the Ferguson Will, and for an accounting.

In addition to the foregoing, in the prayers of the

complaint, petitioner asks that The Art Institute of Chicago be removed as Trustee of the B. F. Ferguson Monument Fund and that a Successor Trustee be appointed to administer said fund.

The sworn complaint is set out in full at the beginning of the record which has been filed herein and is also set out in full in "Additional Abstract of Record" also filed herein. The sworn complaint does not set out the wording of either decree or in what particular either decree reflects an injury on him, the petitioner, or on the public whom he undertakes to represent. He charges fraud and collusion in general terms, draws unwarranted conclusions, both criticizes and exculpates two Attorneys General, but fails to set forth the reasons why the two decrees should be vacated or why the two Trustees should be removed.

In one paragraph of his sworn complaint (Complt. par. 19, Addl. Abst. 11, 12), petitioner mixes some allegations of fact with conclusions and words of opprobrium, as follows:

> "(19) That in Case No. B 269011 the defendant, The Art Institute of Chicago by and through its attorneys, agents and servants, in *perpetrating its hoax on plaintiff* and other persons similarly situated, drafted its complaint, the Answer for the Attorney General, and the Decree and Order of Court not only on the same typewriter but also using the same stationery and using the blue backs of the Art Institute's Counsel as the blue backs for the Attorney General of Illinois; that on information plaintiff avers the filing of the Complaint, the answer and the entry of the Decree and Order by the Court took place on May 22, 1933, between the hours of 10:00 A. M. and 11:00 A. M. and by the *aforesaid collusive and fraudulent actions* perpetrated by the defendant, The Art Institute of Chicago, the defendants *accomplished their purpose* by having the Last Will and Testament of B. F. Ferguson *repudiated* under the protective cloak of the *voidable*

decrees on said date and *approved* the entire B. F. Ferguson Monument Fund for the use and benefit of The Art Institute of Chicago; that said Fund was then in excess of $1,200,000.00 and to date, plaintiff is informed approximates $1,600,000." (Italics ours.)

In the next paragraph 20, petitioner alleges that no oral testimony was taken. However, in paragraph 24, Additional Abstract 16, petitioner "avers that the integrity of the then Attorney General, Otto Kerner, is not impugned by the charges herein."

We urge the court to read the complaint and to observe the failure to allege the property right or the manner in which it was taken from petitioner without due process.

Each defendant filed motions directed to the complaint under Sections 48 and 49 of the Illinois Practice Act, which motions were sustained by the trial court. These motions set up, among other things, that petitioner did not have a legal right to sue and that the cause of action was barred by a prior judgment. The motions recited that the prior case (55 C 249) had been taken to the Appellate Court and there decided, and that in that opinion, entitled "*The Art Institute of Chicago v. Latham Castle, Attorney General*," 9 Ill. App. 2d, at 473, the court had held that the Attorney General and the State's Attorney have exclusive jurisdiction to enforce and construe charitable trusts. Petitioner has not seen fit to furnish this court with a copy of the opinion in this related case, so this respondent does so as Appendix A, page 15 of this response.

After the trial court sustained defendants' motions in bar to petitioner's suit, petitioner appealed to the Appellate Court of Illinois, First District, which sustained the trial court. The Appellate Court's decision is appended to the petition for certiorari as Appendix A at pages 1a and following thereto. An examination of that opinion reveals that the Appellate Court sustained the Superior Court on

four numbered grounds, pages 4a and 5a. Each of these grounds is non-Federal. After filing a petition for rehearing, which was denied (Appendix C, p. 7a), petitioner filed a petition for leave to appeal to the Supreme Court of Illinois (pp. 7a and 8a). Leave to appeal was denied without opinion (p. 8a). Subsequently, petitioner brought a petition for a writ of certiorari in the Supreme Court of the United States.

The Constitutional question claimed by the Petitioner is here presented for the first time. It was not presented to any of the courts below either by pleadings or by any other action by the petitioner. In his petition, petitioner now says that the question is whether the State of Illinois, without contravening the due process clause of the Fourteenth Amendment to the United States Constitution, denied petitioner, a contemplated beneficiary of a public charitable trust, his standing as an interested party in an action against respondents, trustees of a charitable trust, to vacate and set aside "contrived orders of court". The statement of petitioner, page 2, is somewhat incoherent. In effect, petitioner seems to say that Illinois, by adhering to the common law rule that a member of the public is represented by the Attorney General in any suit involving the enforcement of a public charitable trust, does thereby deprive the petitioner of his rights of due process (see Petition, page 10, last sentence of first paragraph).

Nowhere, prior to the filing of his petition in the Supreme Court of the United States, has Petitioner asserted this claim.

The complaint of petitioner is liberally sprinkled through with the use of words of fraud and collusion of this respondent and with occasional allegations that petitioner, plaintiff below, was deprived of property without due process of law. Nowhere in this petition for certiorari is

there a compliance with subparagraph (f) of paragraph 1 of Rule 23 of the Supreme Court which requires, "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e. g.*, by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In his sworn complaint (Para. 12(a), Add'l Abst. 6-8), Petitioner alleges that his rights in the property left in trust by B. F. Ferguson were vested and that they were "wrongfully taken from him without due process of law; that the deprivation of his said property right without due process of law" was made doubly certain by two decrees of the Circuit Court of Cook County, Illinois, one entered in 1933 and the other entered in 1956. The decree of 1933 Plaintiff alleges "was an unqualified hoax and was collusively planned and executed at the instance of the defendant The Art Institute of Chicago and ratified and condoned by the defendant The Northern Trust Company." Nowhere in his complaint does Petitioner allege that Illinois does not provide a remedy. His only allegations under the Fourteenth Amendment are in general terms, that he was the victim of fraud on the part of Respondent The Art Institute of Chicago and that the Attorney General of Illinois did not adequately represent the public in the suits

in question. All this is alleged in the sworn complaint, despite a specific allegation that the "integrity of the then Attorney General, Otto Kerner, is not impugned by the charges herein." (Complt. para. 24; Add'l Abst. 16).

Petitioner in his complaint also alleges that "he does not charge the Attorney Generals with any wrongful intent or conduct." (Complt. para. 15, Add'l Abst. 10.) He charges that "by their respective nominal conduct, they erroneously permitted their great offices to be used in derogation of their legal obligations in the representation of the Plaintiff and others similarly situated under the statutes of the State of Illinois, in that they were charged with knowledge in each case that the exactions of the Illinois statutes and requirements of due process were not met." Despite repetitious use of the words "hoax", "collusion", "fraudulent actions", and other words of vituperation, the only apparent charge of any wrongdoing by Respondent The Art Institute of Chicago and by the Honorable Otto Kerner, the then Attorney General of Illinois, is found in paragraph 19 of the complaint (Add'l Abst. pp. 11, 12), wherein it is charged that the complaint of Respondent The Art Institute of Chicago, the answer of the Attorney General, and the decree of the court were typed upon the same typewriter and using the same stationery and the same manuscript covers, and were all filed and the decree entered within the space of one hour on May 22, 1933. From this petitioner draws the unfair conclusion that the actions were collusive and fraudulent and the decree was voidable, and had been prearranged and agreed upon by the parties thereto without any evidence being adduced in open court, although the language of the decree recites that the proof was oral, documentary, and written, taken and filed. Plaintiff concludes that the language of the decree was authored by The Art Institute of Chicago and that the Attorney General did not represent the public interest in this matter.

Petitioner seems to have the idea that the Superior Court should have engaged upon a long hearing and a voluminous record should have been made. We call to this court's attention the fact that no building was built under the decree of 1933. In 1955, The Art Institute of Chicago filed another suit concerning the Ferguson Monument Fund in case No. 55 C 249. In this case various interested parties sought leave to intervene and one of them, "The National Sculpture Society", appealed to the Appellate Court from a decision of the trial court denying it leave to intervene. The action of the trial court was there affirmed. The decision is reported as *The Art Institute of Chicago* v. *Castle*, 9 Ill. App. 2d 473. Appendix A (p. 15) to this Response.

A full reading of the complaint below, Record 1, will reveal that Petitioner has filled it with words of vituperation, but no actual charges of fraud.

Wild words of vituperation do not adequately charge fraud.

Owens v. *Green*, 400 Ill. 380.
Smith v. *Board of Education*, 405 Ill. 143.

Respondent respectfully says that the complaint charges nothing and that the petition for certiorari is an imposition on the time of the court, and should be denied.

Respectfully submitted.

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EXHIBIT A.

DECISION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, IN THE CASE ENTITLED:

THE ART INSTITUTE OF CHICAGO, *Plaintiff*,
vs.
LATHAM CASTLE, Attorney General of the State of Illinois, *Defendant*,
NATIONAL SCULPTURE SOCIETY, *Petitioner to Intervene—Appellant*.

Reported
9 Ill. App. 2d 473.

MR. JUSTICE BURKE delivered the opinion of the Court.

On November 25, 1904, Benjamin F. Ferguson made his last will. The Northern Trust Company was named as trustee. He died on April 10, 1905. The will was admitted to probate in the Probate Court of Cook County and the estate was duly administered and distributed. Subparagraph (e) of the Fifth paragraph of the will reads:

"My said Trustee after paying the bequests hereinabove mentioned and establishing or realizing and keeping intact a permanent trust fund of not less than $1,000,000.00 shall annually thereafter or oftener, if required, pay the entire net income arising therefrom (after deducting its compensation as Trustee herein mentioned) to The Art Institute of Chicago, to be known as the B. F. Ferguson Monument Fund and entirely and exclusively used and expended by it under the direction of its Board of Trustees in the erection and maintenance of enduring

statuary and monuments, in the whole or in part of stone, granite, or bronze, in the parks, along the boulevards, or in other public places within the City of Chicago, Illinois, commemorating worthy men or women of America, or important events in American History. The plans or designs for such statuary or monuments and the location of the same shall be determined by the Board of Trustees of such Institute."

On May 22, 1933, the Circuit Court entered a decree in the case entitled "The Art Institute of Chicago, a corporation, *vs.* Otto Kerner, Attorney General of the State of Illinois;" construing the word "monument" to mean and include a memorial building. The decree authorizes the expenditure by the Art Institute of Chicago of moneys belonging to the fund for the erection of a memorial building east of the Illinois Central Railroad right of way in Grant Park to be the key building in a building program for the Institute which included several other buildings. The memorial building authorized by the decree has never been constructed.

In a complaint filed on January 7, 1955, by the Institute against the Attorney General of Illinois the plaintiff says that it now proposes to erect a B. F. Ferguson Memorial Building on a different site, that the present plans which have been completed by its architects and approved by its Board of Trustees provide for the erection of a five-story administration building in Grant Park immediately west of the right of way of the Illinois Central Railroad and immediately north of and adjacent to the present permanent Art Institute Building, rather than east of the railroad as contemplated at the time of the 1933 decree. Continuing, the complaint states that the building shall be used as an administration building for the Art Institute and shall contain offices, shops, studios and other rooms supplementing the existing facilities;

that the building shall be of a type of architecture that will, in the opinion of the trustees of the Institute, be suitable and fitting as a memorial building; that the building will be erected upon land owned by the Chicago Park District and that by contract between the District and the Institute the latter will have the permanent use and occupancy of the building. The complaint further recites that in view of the fact that the 1933 decree authorizes the expenditure by plaintiff of moneys from the fund for the erection of a memorial building as specifically described in that decree, the plaintiff is in doubt as to whether the language of the will as construed in the decree means and includes any other memorial building, and prays that the court construe the will as construed in the 1933 decree and determine whether the language of the will as in that decree construed means and includes any other memorial building, and whether the use of the funds may be properly expended by it for the erection and maintenance of a memorial building as described in the complaint.

The Attorney General filed an answer admitting the factual allegations and submitting the matters concerning the interests of the people of the State of Illinois to the consideration and protection of the court, praying that in the event a decree is entered pursuant to the complaint that the decree will contain provisions to protect the interests of the people. The National Sculpture Society filed an amended petition representing that it is a corporation not for profit created under the laws of New York, organized for artistic and educational purposes and for the purpose of fostering the development and appreciation of sculpture, spreading the knowledge of good sculpture, fostering the taste for and encouraging the production of ideal sculpture for households and museums, and promoting the decoration of public and other buildings, squares and parks with sculpture of a high class;

not limited to the institution of original suits. The vexation, delay and expense caused by attempts of individuals to intervene in pending suits to enforce or construe charitable trusts is as real and as great as that resulting from the filing of such suits by individuals whose only objectives are the promotion of private interests. We are convinced that the case of *Hartzell* v. *Hungate*, 223 Ill. App. 346, cited by the petitioner, is not applicable to the facts of the instant case. There the court found that a taxpayer in the City of La Harpe had at least a contingent interest in the fund.

The petitioner maintains that it has an interest in the cause and is uniquely equipped by the character of its membership and its half-century experience in the field of sculpture to render necessary assistance to the court to enable it to arrive at a just determination. The sole question is whether a memorial building different from the one authorized by the 1933 decree may be built at a slightly different location than originally authorized. In the determination of this question the National Sculpture Society has no interest and cannot be affected by the result. Neither the Society nor any of its members has any contractual relationship with or rights against the Art Institute as trustee of the fund. The mere hope of a commission is so remote as to be inconsequential. The beneficiaries of the charitable trust set up by the will are the people of the State of Illinois generally, not the sculptors who may be commissioned to erect statuary and not the architects and builders who may be employed to erect a memorial building. The Attorney General is vested with the right and duty to protect the people's interests in the enforcement of charitable trusts. The petitioner cannot contribute to the protection of the public interest in the question of whether one building or another be erected and whether

the building should be located just east or just west of the Illinois Central right of way.

The 1933 decree in which the then Attorney General was the defendant, posed the question whether the word "monument" in the will means and includes a memorial building and the further question whether the building described in that complaint constituted a memorial building within the meaning of the will. The decree decided that the word "monument" includes a memorial building and that the trustees of the Art Institute, in the exercise of their discretion under the will as construed, may use the moneys of the fund in the erection and maintenance of statuary and memorial buildings or other forms of monuments. That building not having been erected and the trustees now desiring to erect a building of a slightly different design in a slightly different location, presented this changed program to the Circuit Court and asked that court to resolve the doubt as to whether the use of the funds for a memorial building to Mr. Ferguson was limited to the building described in the decree. We are satisfied that the chancellor was right in deciding that the petitioner should not be permitted to intervene for the purpose of setting aside the 1933 decree.

The petitioner asserts that the present action is in reality for the modification and extension of the 1933 decree and in the nature of a complaint for review. The action is not one in the nature of a complaint for review. Bills of review fall into three categories into none of which the present action can be placed: (a) bills to review errors appearing on the face of the decree; (b) bills based upon newly discovered evidence; and (c) bills based upon allegations of fraud in the obtaining of the original decree. The instant case seeks the court's approval on the decision of the trustees to erect a building of a slightly different

design and in a slightly different location than the building authorized in the 1933 decree.

Finally, petitioner maintains that there is a serious question as to whether there is not a necessary party lacking, namely, the Northern Trust Company. The latter is the residuary trustee under the will, which directs that the trustee shall keep intact a permanent trust fund of not less than $1,000,000.00 and shall, after the payment of certain bequests, annually pay the entire net income arising therefrom to the Art Institute, to be held as the B. F. Ferguson Monument Fund. When the income payments have been made to the Art Institute, the obligations and duties of the trust company with respect thereto are at an end. The will provides that the income received by the Art Institute shall be held by it as the B. F. Ferguson Monument Fund and shall be entirely and exclusively used and expended by it under the directions of its Board of Trustees in the erection and maintenance of enduring statuary and monuments. The testamentary trustee is not a necessary party to a suit to enforce the proper use of the funds and it was not necessary that it be made a party.

For the reasons stated the order of the Circuit Court of Cook County is affirmed.

Order affirmed.

Friend, *P. J.*, and Niemeyer, *J.*, concur.